No. 48728-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TRYGVE NELSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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II. STATEMENT OF THE CASE

On July 1, 2013, Trevyn DeLapp was a registered nurse working in the Providence Centralia emergency room. RP (9/19/13) 28-30. At around 4:00 that morning, DeLapp was walking by Trygve Nelson's room when Nelson motioned to get his attention. RP (9/19/13) 31. Nelson had been admitted to the hospital hours earlier for alcohol intoxication and had been placed on a safety hold by the doctor. RP (9/19/13) 30, 37. When Nelson first came into the emergency room, he had been medicated and intubated. RP (9/19/13) 55-56.

DeLapp responded to Nelson by walking over to his door. RP (9/19/13) 31. Nelson pointed to the floor where he had defecated and told DeLapp in a boastful manner that DeLapp would need to clean up Nelson's mess. RP (9/19/13) 31, 89. DeLapp told Nelson his behavior was inappropriate and Nelson would have to clean up after

himself. RP (9/19/13) 31. Nelson was unhappy with DeLapp's response and decided he was going to leave. RP (9/19/13) 31. DeLapp told Nelson he could not leave the hospital yet because he was still on a hold and the doctor wasn't ready to discharge him until he was at a sober level. RP (9/19/13) 31-32. Upon hearing this, Nelson went to grab his belongings to leave. RP (9/19/13) 32. DeLapp told one of the other nurses they needed to get security. RP (9/19/13) 32.

Nelson picked up his belongings, lowered his shoulder, and ran full force into DeLapp, who was in the doorway. RP (9/19/13) 32, 37. DeLapp was knocked back a few feet and nearly bumped into the stretcher of a newly arrived ER patient. RP (9/19/13) 32, 37-38. DeLapp stopped Nelson from running out of the room, and possibly into the other patient, by holding Nelson in a bear-hug and walking him back into the room. RP (9/19/13) 32. Michael Ross, another registered nurse working at the hospital, assisted in trying to restrain Nelson. RP (9/19/13) 87, 90. During this time, Nelson tried to swing his hand toward Ross's face multiple times, which Ross blocked with his arm, resulting in Nelson striking Ross in the shoulder. RP (9/19/13) 90-91, 102-103, 108. Nelson was restrained on a stretcher, and the police were called. RP (9/19/13) 32-33.

After Nelson was arrested, DeLapp and Ross, along with hospital housekeeping, had to clean up the floor in the area where Nelson defecated. RP (9/19/13) 109. This required use of cleaning supplies and equipment and fifteen to twenty minutes of hourly employee time. RP (9/19/13) 43, 109-10.

The State charged Nelson with two counts of Assault in the Third Degree and one count of Malicious Mischief in the Third Degree. CP 1-3.

At trial Nelson did not present evidence and did not argue self-defense. RP (9/19/13) 119, 120-21; RP (9/20/13) 27-37. Nelson did argue that because he had been discharged, DeLapp and Ross were not performing health care duties when they prevented him from leaving. RP (9/20/13) 34-35.

The jury was given a lesser included instruction on Assault in the Fourth Degree for both assault charges. CP 21-22. The basis for offering the lesser included was the argument that the jury could find Nelson assaulted DeLapp and Ross while not finding they were performing health care duties, a necessary element for Assault in the Third Degree. RP (9/19/13) 121-28.

The jury found Nelson guilty of two counts of Assault in the Third Degree and one count of Malicious Mischief in the Third

Degree. CP 33-35. Nelson was sentenced on September 25, 2013. CP 36-47. The court was told that Nelson had been disabled and had not had an income for many years. RP (9/25/13) 10. The court ordered legal financial obligations, including a $500 victim assessment, $200 filing fee, $81 sheriff service fee, $1800 for his court appointed attorney, and $100 for DNA collection. This appeal follows. CP 48.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO FIND NELSON GUILTY OF ASSAULT IN THE THIRD DEGREE AND MALICIOUS MISCHIEF IN THE THIRD DEGREE.

Nelson argues the State did not present sufficient evidence to sustain the jury's verdicts of guilty to two counts of Assault in the Third Degree and one count of Malicious Mischief in the Third Degree. Brief of Appellant 5-13. The State presented sufficient evidence to sustain the jury's guilty verdict for each charge.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the

essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Proved Each Element Beyond A Reasonable Doubt, As Required, And Therefore Presented Sufficient Evidence To Sustain The Jury's Guilty Verdicts.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State*

v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

a. The evidence in the light most favorable to the State establishes that the victims were performing health care duties at the time of the assaults.

To convict Nelson of Assault in the Third Degree the State was required to prove, beyond a reasonable doubt, that on or about July 1, 2013, Nelson assaulted a nurse or health care provider who was performing his nursing or health care duties at the time of the assault." RCW 9A.36.031(1)(i); CP 14-15.

Nelson argues the evidence shows that DeLapp and Ross were not performing health care duties at the time he assaulted them because he had been discharged from care and the nurses had no right to keep him in his hospital room. Brief of Appellant 5-10. However, this argument fails as it is not based on viewing the evidence in the "light most favorable to the State" or drawing all reasonable inferences in the State's favor.

The State presented evidence that DeLapp informed Nelson that he was not ready to be discharged and could not leave the room. RP (9/19/13) 31-32. DeLapp also testified that during his contact with Nelson, DeLapp acted in part to prevent Nelson from running into another patient. RP (9/19/13) 32. Ross testified that he assisted in trying to restrain Nelson and return him to his stretcher/bed. RP (9/19/13) 87, 90. From this evidence, a reasonable jury could find that DeLapp and Ross were performing health care duties.

Nelson's argument, that he had been discharged and the nurses therefore had no authority to prevent him from leaving, requires viewing evidence and making inferences in his favor, which is not the proper standard of review. Although there was conflicting testimony regarding Nelson's discharge paperwork and status, the jury was allowed to find DeLapp's testimony credible when he said he did not believe Nelson had been discharged. The jury had an opportunity to find an assault occurred against people who were not performing health care duties. CP 21-22. The jury chose not to make such a finding, which was a decision a rational jury could make in light of the evidence.

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Nelson committed two

counts of Assault in the Third Degree and this Court should affirm his convictions.

b. State's burden to disprove self-defense never arose and Nelson fails to show this Court that any failure to disprove self-defense is a manifest constitutional error that can be raised for the first time on appeal.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted)*.

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of

constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted)*. No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id*.

Nelson fails to argue how any failure on the State to prove absence of self-defense is a manifest constitutional error beyond making such an assertion. Brief of Appellant 11 n.10. Nelson has not articulated any actual prejudice or that this alleged error had an identifiable and practical consequence in the trial. There was no actual prejudice because the State's burden to disprove self-defense never arose.

To raise a claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense. *State v. Graves*, 97 Wn. App. 55, 61, 982 P.2d 627 (1999) (citation omitted). A person acts in self-defense when he reasonably believes he is about to be

injured and when the force used is not more than is necessary. RCW 9A.16.020(3). A defendant must produce evidence showing that he had a good faith belief in the need to use force, a belief which was objectively reasonable. *State v. Miller*, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997). The burden shifts to the State to disprove self-defense only after the defendant places the claim at issue. *State v. Acosta*, 101 Wn.2d 612, 615-19, 683 P.2d 1069 (1984). A defendant's constitutional right to control his or her defense prohibits the giving of instructions concerning defenses over the defendant's objections. *State v. Coristine*, 177 Wn.2d 370, 376, 300 P.3d 400 (2013). *See also State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013).

Contrary to Nelson's argument, the State's burden to disprove self-defense never arose.[1] Nelson never asserted self-defense. RP (9/19/13) 119, 120-21; RP (9/20/13) 27-37. During trial, Nelson argued DeLapp and Ross were not performing healthcare duties and the State failed to meet its burden because it presented conflicting testimony. RP (9/20/13) 27-37. Nelson did not assert self-defense, therefore the State's burden never arose. Additionally, because

[1] Nelson cites multiple cases to support his claim that the State was required to prove the absence of self-defense. Brief of Appellant 10-11. However, in each case cited, the defendant raised a claim of self-defense at trial and can be distinguished from the present case.

Nelson had the constitutional right to control his defense, it would be improper for the State to emphasize the absence of self-defense if Nelson never chose to raise the defense.

The evidence did not show that Nelson acted in self-defense. A reasonable person would not objectively believe DeLapp or Ross were about to injure Nelson. When Nelson ran into DeLapp, DeLapp was simply standing in the doorway, telling Nelson he could not leave the hospital yet. A reasonable person would not believe that DeLapp was attempting to injure Nelson. When Nelson struck at and hit Ross, Ross was performing his health care duties. A reasonable person would not believe that a nurse, who was attempting to restrain a patient who had run into another nurse and almost caused a collision with another patient, was attempting to injure the restrained patient. There was no evidence of self-defense presented, and the State's burden to disprove self-defense never arose. Nelson has not satisfied the requirements to show this Court that the error is manifest and the alleged error is not properly before this Court.

c. "Physical Damage" includes the cost of repairs to restore an injured property to its former condition, which includes the cost of labor.

To convict Nelson of Malicious Mischief in the Third Degree the State was required to prove, beyond a reasonable doubt, that on

or about July 1, 2013, Nelson knowingly and maliciously caused physical damage to the property of another. RCW 9A.48.090; CP 24. Physical damage includes the reasonable cost of repairs to restore the injured property to its former condition. *State v. Gilbert*, 79 Wn. App. 383, 385, 902 P.2d 182 (1995) (*citing State v. Ratliff*, 46 Wn. App. 325, 730 P.2d 716 (1986)).

In *State v. Ratliff*, Ratliff was charged with Malicious Mischief in the Second Degree for damage done to the interior of a police van. 46 Wn. App. at 326. The figures used to obtain the required minimum damage threshold of $250 included the cost of labor to replace a police radio and van window. *Id*. at 327. Ratliff argued the meaning of damages should not include cost of repairs. *Id*. at 328.[2] The court held that the cost of repair had long been allowed as an element of damages and that when a claim involves injury to personal property, it is usually expressed as the reasonable cost of repairs to restore the property to its former condition and for the loss of use during the period of repair. *Id*. at 328-29.

Here, while there weren't any parts that needed to be replaced, there was a need to restore the floor to its former condition

[2] The damages without cost of labor to repair would have been less than $200 and would not have met the threshold for second degree malicious mischief. *Id.* at 327.

so the room could be used for other patients. RP (9/19/13) 43, 109-10. That restoration, cleaning up medical waste, required the expenditure of time, labor, and resources. RP (9/19/13) 43, 109-10. The jury instruction for physical damage, that was offered without objection, stated that physical damage included "the reasonable cost of repairs to restore injured property to its former condition." CP 28; RP (9/19/13) 121-129; RP (9/20/13) 3-4. This definition is supported by the case law cited above. A rational jury could find that the costs of clean up were included in the definition of physical damage and that Nelson caused that damage knowingly and maliciously.

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Nelson committed Malicious Mischief in the Third Degree and this Court should affirm his conviction.

B. THE STATE CONCEDES THAT THE TRIAL COURT IMPOSED NON-MANDATORY LEGAL FINANCIAL OBLIGATIONS WITHOUT FIRST INQUIRING ABOUT NELSON'S PRESENT OR FUTURE ABILITY TO PAY.

Nelson argues the trial court imposed discretionary[3] legal

[3] Nelson also argues that non-discretionary LFOs, aside from the victim assessment, are inappropriate because Nelson has a mental health condition under RCW 9.94A.777. However, with the record as it currently stands, it is unclear whether RCW 9.94A.777 applies. The statute applies when the defendant has a diagnosed mental disorder that prevents gainful employment evidenced through enrollment in a public assistance program based on mental disability, a record of involuntary hospitalization, or a competent expert evaluation. RCW

financial obligations without considering his financial resources and present or future ability to make payments. Brief of Appellant 14-17.

In *State v. Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations there must be an individualized determination of a defendant's ability to pay. *State v. Blazina,* 182 Wn.2d 827, 834, 344 P.3d 680 (2015).[4] The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38. Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances. *Id.* The trial court must make an individualized determination about not only the present but

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9.94A.777(2).The evidence in the record is that Nelson was not working, was disabled, and was receiving mental health services. RP (9/25/13) 4, 6, 10. There was no expert evaluation presented and no evidence presented that Nelson received disability pay for mental illness or that Nelson had a record of involuntary hospitalization. Whether such evidence exists is an issue that the trial court can address and determine upon remand in deciding which fines are appropriate.

[4] Nelson was sentenced prior to the Supreme Court's ruling in *Blazina*.

future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id*. In *State v. Duncan*, the Washington State Supreme Court determined that the imposition and collection of legal financial obligations have constitutional implications and may be challenged for the first time on appeal. *State v. Duncan*, 185 Wn.2d 430, 434-38, 374 P.3d 83 (2016).

The State requested and the trial court imposed discretionary legal financial obligations. CP 42-43. The court did not conduct any specific inquiry to find that Nelson would be able to make payments. RP (9/25/13) 13. Therefore, the State concedes that non-mandatory legal financial obligations were imposed without inquiring about Nelson's present or future ability to pay, and this Court should remand the case back to the trial court to make the proper inquiry.

IV. CONCLUSION

The State presented sufficient evidence to sustain Nelson's convictions for two counts of Assault in the Third Degree and one count of Malicious Mischief in the Third Degree. However, the State concedes that non-mandatory legal financial obligations were imposed without inquiring about Nelson's present or future ability to pay. Therefore, this Court should affirm Nelson's convictions but

remand the case back to the trial court to make the proper inquiry and impose legal financial obligations accordingly.

RESPECTFULLY submitted this 22nd day of November, 2016.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. TRYGVE NELSON, Appellant.	No. 48728-4-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Jessica L. Blye, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On November 22, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi R. Backlund of Backlund & Mistry, attorneys for appellant, at the following email address: Backlundmistry@gmail.com.

DATED this 22nd day of November, 2016, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

November 22, 2016 - 3:15 PM

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